

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Review of the Commission's |) | |
| Broadcast and Cable |) | MM Docket No. 98-204 |
| Equal Employment Opportunity |) | |
| Rules and Policies |) | |

Comments

The School Board of Broward County, Florida ("Broward"), by counsel, hereby submits these Comments in the above-captioned proceeding. Broward is the licensee of noncommercial educational television station WPPB-TV, Channel 63, Boca Raton, Florida. As explained below, the existing regulatory burden on Broward and other public broadcasters need not be increased in order to accomplish the Commission's legitimate objectives in this proceeding.

Background

In its *Second Notice of Proposed Rulemaking* (the "NPRM"), the Commission proposed to retain its requirement that all broadcasters refrain from employment practices which discriminate on the basis of racial or sexual classification. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, FCC 01-363, ¶18 (December 21, 2001). In addition, the FCC proposed new Equal Employment Opportunity Rules requiring all broadcasters to perform extensive recruitment efforts. *Id.* at ¶¶20-31. Further, the Commission proposed new recordkeeping and reporting requirements for all broadcasters. *Id.* at ¶¶32-52.

Broward is the biggest business in Broward County, employing some 21,000 full and part time employees in a variety of jobs, including teaching,

custodial, transportation, and administrative positions. See <http://www.browardschools.com/departments/employment/>.

Broward's track record in employing and promoting minorities in the school system far exceeds state and national standards. *Id.*

As a government entity, Broward is already subject to numerous EEO rules prohibiting discrimination on the basis of race or sex, among other categories. See "Existing EEO Mandates," attached hereto as Exhibit A. Burdening Broward with redundant record-keeping and reporting requirements would merely increase the costs of regulatory compliance without substantially advancing the FCC's goals. The same is generally true for any other public agency which might be operating a noncommercial education broadcast facility.

The Commission therefore should not impose additional EEO requirements on any public, noncommercial facility. In every case to Broward's knowledge, these licensees are already subject to extensive EEO mandates. The Commission should establish a means of demonstrating compliance that are less burdensome than the proposed Rules.

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I. Public Agencies Are Already Subject to Broad Prohibitions on Discrimination.

The Commission's EEO Rules have historically applied to all broadcasters, whether commercial or noncommercial in nature. See *Valley Public Television, Inc.*, 12 FCC Rcd 22795, ¶14 (1998), and citations therein. Broward does not propose to exempt all NCE licensees. Instead, the Commission should merely recognize that current EEO requirements on *public* agencies already extend at least as far as those that the FCC would impose on all broadcasters, generally, and often exceed the proposed FCC standards.

In fact, public agencies are already prohibited from more numerous types of discrimination than those to which most broadcasters will be subject under the proposed EEO Rules. As the Commission explained in the *NPRM*, its EEO Rules are intended to require broadcasters to “reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities” in order to avoid unfair exclusion of “minority and women candidates.” *NPRM* at ¶¶5. Thus, the Commission is focusing on illegal discrimination based on racial or sexual classifications only.

Broward has actually implemented safeguards to prevent discrimination based not only on these kinds of categories, but on physical disability or sexual orientation, as well. Since public agencies such as Broward already work harder to prevent discrimination than the new Rules would require, such agencies should not be compelled to bear the burden of demonstrating compliance with additional mandates.

II. The Commission Should Not Compel Redundant Outreach Efforts.

Wide dissemination of information relating to each employment vacancy constitutes the “core” of the proposed FCC outreach requirement. *NPRM* at ¶¶6. Both the first and second prongs of the proposed EEO Rules relate to widespread publicity of job openings. See *id.* at ¶¶16.

Broward already devotes tremendous resources to disseminating information relating to job openings pursuant to its “Equal Employment Plan.” For example, Broward publicizes job openings in nearly forty local, state, regional and national publications, including several internet sites (in addition to its own), at an annual cost of almost \$30,000.

Such a vast recruitment effort clearly extends well beyond anything that the Commission might wish to impose on all broadcasters. Smaller private entities could not achieve a fraction of the information dissemination that Broward

performs for its vacant employment positions. Other public broadcasters devote similarly extensive efforts to publicize job openings. The Commission should therefore not concern itself that public agencies may not be disseminating information broadly enough.

The final prong of the Commission's new outreach requirements would consist of numerous recruitment initiatives by broadcasters. *NPRM* at ¶16. Again, public agencies already devote generous resources to outreach efforts. For example, Broward budgets tens of thousands of dollars for recruitment through the "Upward Bound" program every year. The proposed FCC Rules would simply impose redundant requirements. Accordingly, the new EEO Rules should permit public agencies merely to certify that they are engaged in recruitment efforts that substantially achieve the FCC's purposes.

III. The Commission Should Not Compel Redundant Recordkeeping and Reporting.

The Commission has proposed imposing several recordkeeping and reporting mandates on broadcasters. *NPRM* at ¶16. However, the FCC specifically asked for "less burdensome alternatives that will achieve [these] objectives." *Id.* at ¶32; see also ¶43. Unfortunately, the proposed EEO Rules would unnecessarily burden those broadcasters who already maintain essentially the same data pursuant to an existing annual review process. Broward's internal policies already require an annual review of the school board's hiring practices.

As stated in Section 4002.14 of Broward's *School Board Policies*:

The Director, Equal Employment Opportunities shall monitor the screening and application process to insure equal opportunity. Internal compliance review by the Equal Educational Opportunities Department shall include a report, at least annually, which has (1) a summary of applicants and candidates by sex, and race and ethnic classifications; (2) recruitment sources used and (3) commentary as to the recommendations in light of the Equal Employment Plan goals and utilization for the employment category.

It should suffice for the Commission's purposes here that a public licensee simply file with the Commission a copy of its Equal Employment Plan, relevant portions of its annual internal compliance review, and a certification that its recruitment efforts substantially comply with the FCC's purposes. So long as the documentation assures the Commission that the public agency's outreach efforts are substantially similar to those that the FCC wishes all broadcasters to perform, there is no reason why public agencies should be compelled to generate additional paperwork.

The Commission's stated purpose in imposing these recordkeeping and reporting requirements is to monitor developments in the industry. *NPRM* at ¶43. For public agencies that are generally subject to a data collection and review process, the submission of the most recently obtained data to both the Commission and the public inspection file should more than suffice in order to achieve the FCC's goals.

The Commission has proposed to require the submission of FCC Forms 396 (EEO Program Report), 397 (Statement of Compliance) and 395-B (Annual Employment Report). Any public agency's annual review of employment practices already address the purposes of these forms. Such reports contain substantially all of the employment data that broadcasters must report on Form 395-B. Similarly, any public broadcaster's Equal Protection Plan would serve the purposes of the FCC's Form 396. Likewise, a public agency's simple certification of compliance with the FCC's purposes underlying the proposed EEO Rules would serve as well as Form 397.

IV. Broward's Proposal Presents No Constitutional Problems for the Commission.

The *NPRM* specifically requested that comments address constitutional questions, including those invoked by an equal protection analysis, posed by the new Rules. *NPRM* at ¶21. As explained below, the Commission's Rules and policies can recognize the reality of current practices and refrain from imposing redundant requirements without invoking constitutional concerns.

The Commission's previous EEO Rules included an option whereby broadcasters need not have reported the race or sex of job applicants. Under that option, broadcasters' outreach efforts did not need to attract minority and women candidates. *NPRM* at ¶12. This option survived scrutiny by the Court of Appeals for DC Circuit because it did not subject broadcasters to significant pressure to recruit minority and women candidates. *Id.*, citing *MD/DC/DE Broadcasters Association v. FCC*, 236 F3d 13, 19 (D.C. Cir. 2001), *rehearing den.* 253 F3d 732 (D.C. Cir. 2001), *pet. for cert. filed*, *MMTC v. MD/DC/DE Broadcasters Association*, No. 01-639 (October 17, 2001) (hereinafter "*Association*"). Similarly, Broward's proposed exemption for public agencies would not establish any new requirement that broadcasters collect or report employment data with racial or sexual classifications.

The Court struck down the FCC's former EEO Rules because they also included an option which, if elected, would have required broadcasters to report the race and sex of each applicant for an employment vacancy. *Id.* at ¶11, *citing Association*, 236 F3d 13 at 21-22. The Court determined that the FCC's requirement could disadvantage non-minority candidates for employment and was not narrowly tailored to achieve a compelling interest in deterring discrimination. *Id.*

The mere fact that a public agency does track employment data using racial and sexual categories should not pose a constitutional problem for the FCC's proposed Rules so long as the FCC has not required the use of such

classifications. Broward does not propose that the FCC require any broadcaster to track applicants by race or sex, or to conduct extensive outreach efforts aimed at recruiting minorities and women. Rather, the Commission should recognize that public agencies already achieve the stated goal of these Rules -- the widespread dissemination of information to promote a diverse workforce. Accordingly, alternative means of demonstrating compliance with the new EEO Rules for agencies already subject to broader requirements should not pose an equal protection problem for the Commission.

Indeed, the Court of Appeals did not go so far as to say that *any* FCC-imposed requirement that broadcasters track employment data using racial and sexual classifications is constitutionally invalid. Yet, even if it had held as much, the mere use of an existing Equal Employment Plan, as well as data obtained from such a program, as either grounds for an exemption from the FCC's EEO Rules or as a substitute measure of compliance, should not jeopardize the proposed Rules. An exemption from the Commission's EEO Rules for public agencies operating noncommercial educational facilities would therefore survive an appeal on equal protection grounds.

Conclusion

Broward and other government entities in similar circumstances are already subject to rigorous requirements aimed at the same policies underlying the FCC's proposed Rules. The proposed Rules would therefore prove redundant and unduly burdensome, without procuring additional benefits. Accordingly, the Commission should exempt public agencies operating noncommercial educational facilities from whatever EEO Rules and policies the FCC eventually promulgates. At the least, public agencies ought to be able to comply with such Rules simply by filing the data they already compile with the Commission.

Respectfully submitted,

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Dated: April 15, 2002

EXHIBIT A

EXISTING EEO MANDATES

FEDERAL

Age Discrimination in Employment Act (29 CFR, Parts 1625-1627)
 EEOC: Coverage of Apprenticeship Programs Under the Age Discrimination
 Employment Act (ADEA) (29 CFR, Part 1625)
 Americans with Disabilities Act (29 CFR, Part 1630)
 EEOC: Enforcement Guidance on Pre-Employment Inquiries Under the
 Americans with Disabilities Act
 EEOC: Enforcement Guidance: Reasonable Accommodation and Undue
 Hardship
 Under the Americans with Disabilities Act
 Civil Rights Act of 1991 (see Section I)
 Civil Rights Restoration Act of 1987 (see Section I)
 EEOC Enforcement Guidance: Workers' Compensation and the ADA Guidelines
 on Discrimination Because of National Origin (20 CFR, Part 2606)
 Unfair Immigration-Related Employment Practices (28 CFR, Part 44)

STATE

Age Discrimination (Section 112.043-112.044, F.S.)
 Breastfeeding (see section I)
 Discrimination on the Basis of Sex, Marital Status or Race (Section 725.07, F.S.)
 Discrimination on the Basis of Sickle Cell Trait (Section 448.075-448.076, F.S.)
 Florida Human Rights Act: Discrimination in the Treatment of Persons
 (Chapter 760, F.S.)
 Hiring of Illegal Aliens (Section 448.09, F.S.)
 HIV-Disease Nondiscrimination (Section 760.50, F.S.)
 Recommended Guidelines on Health Workers Infected with HIV or HBV, Florida
 Department of Health and Rehabilitative Services, October, 1992
 Principles of Professional Conduct for the Education Profession in Florida
 (Rule 6B-1.006, FAC)
 Rights of Physically Disabled Persons (Section 413.08, F.S.)
 Veterans Preference (Section 295.07)

LOCAL

Broward County Human Rights Act